No. 91-1479

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

In the Matter of the Claim of SHIRLEY KLEIN,

Petitioner,

against

THOMAS F. HARTNETT, as Commissioner of Labor,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does New York State's exemption of non-profit organizations from compulsory unemployment insurance coverage for employees who perform duties of a religious nature at places of religious worship violate either the Establishment Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

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BRIEF IN OPPOSITION

Respondent, Commissioner of Labor of the State of New York ("Commissioner")[1] submits this brief in opposition to the petition for a writ of certiorari. The petition should be denied because it does not raise an important question of federal law which has not been settled by this Court and does not present a conflict with the applicable decisions of this Court.

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[1] After this proceeding was brought, Thomas F. Hartnett resigned as Commissioner of Labor. The current Commissioner is John F. Hudacs.

STATEMENT OF THE CASE

1. Statutory Background

N.Y. Labor Law §563(2) was enacted in 1965 to extend unemployment insurance coverage to non-profit organization employees generally. It repealed the general exemption of non-profit religious, charitable, scientific, literary and educational organizations, but retained exemptions for the following groups:

a) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, by a member of a religious order in the exercise of duties required by such order;

b) a lay member elected or appointed to an office within the discipline of a bona fide church and engaged in religious functions;

c) a person employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature, or both, unless voluntary election has been made pursuant to the provisions of section five hundred sixty one of this article;

d) a person who

1) receives rehabilitative services in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or

2) is given remunerative work in a facility conducted for the purpose of providing such work for persons who cannot be readily absorbed in the competitive labor market because of their impaired physical or mental capacity.

e) an inmate of a custodial or penal institution;

f) a person who participates in a youth service program designed to foster a commitment to community service and occupational and educational development and who, while participating in that program, performs services in the community or attends school and receives a stipend designed to cover expenses incurred in performing services or attending school, and is eligible for an award or scholarship upon leaving the program.[2]

According to the legislative history of this enactment, its purpose was to expand generally the coverage of the State unemployment insurance law, while the exclusions were intended to exempt non-profit organizations with stable employment, those workers who, when employed by non-profit organizations, are not active members of the labor force, and to address the concerns of church and other non-profit groups who claimed that coverage would violate the historical principle of excluding them from taxation. *Memorandum of Industrial Commissioner, Governor's Bill Jacket 1965 N.Y. Laws, Ch. 740.* Thus, §563(2) excludes from unemployment insurance coverage not only persons employed to perform religious functions and duties, but also rehabilitation clients and handicapped workers

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[2] The exclusion of youth service programs, §563(2)(f), was added by a recent amendment, 1991 N.Y. Laws, Ch. 413, §62.

in sheltered workshops, prison inmates, and participants in youth service programs.

2. Facts

Petitioner Shirley Klein taught English literature at a religious high school for girls, known as Beth Jacob High School. The school terminated her employment before the end of the 1987 school year. She filed for and initially received unemployment insurance benefits. However, upon the employer's objection, the Commissioner determined that this employment was excluded from coverage under N.Y. Labor Law §563(2)(c) and that petitioner did not have sufficient weeks of covered employment to file a valid original claim for benefits. N.Y. Labor Law §§527, 563(2)(c). Klein requested and was given a hearing before an administrative law judge ("ALJ") at which she argued that the employer exemption in N.Y. Labor Law §563(2)(c) violated the Establishment and Equal Protection Clauses of the United States Constitution.

The ALJ sustained the Commissioner's determination and the ALJ's decision was affirmed by the New York State Unemployment Insurance Appeal Board. The ALJ and the Appeal Board determined that Klein was ineligible for unemployment insurance benefits because her position as a teacher at the Beth Jacob High School was excluded from coverage under the terms of N.Y. Labor Law §563(2)(c).

The New York Supreme Court, Appellate Division, Third Department, affirmed the Board's decision and held that §563(2)(c) does not violate the Establishment Clause of the First Amendment. The court also rejected Klein's equal protection argument as meritless. *Matter of Klein v. Hartnett*, 164 A.D.2d 9 (3d Dept. 1990) (Pet. App. C).

Upon petitioner's appeal, the New York State Court of Appeals affirmed the decision of the Appellate Division. *Matter of Klein v. Hartnett,* 78 N.Y.2d 662 (1991)(Pet. App. B). The Court of Appeals upheld the state law as consistent with this Court's decisions under the Establishment Clause. Specifically, the court held that the state law's exclusion from unemployment insurance coverage for religious workers met the three-part test articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The Court held that New York Labor Law §563(2)(c) has a secular legislative purpose, as part of a larger act to extend compulsory unemployment insurance coverage to most employees of nonprofit organizations, while retaining exemptions for a range of non-profit organizations having stable employment or providing work for certain persons not in the competitive labor market, 78 N.Y.2d at 667-668, that "the statute's primary effect is the efficient administration of the Labor Law," 78 N.Y.2d at 671, and that any benefit to religion is incidental, since religious organizations do not receive the exclusive benefit of the exemption, 78 N.Y.2d at 668. The Court of Appeals further found that rather than fostering excessive entanglement with religion, "any entanglement between church and State is minimized by the exemption found in section 563(2)(c)," 78 N.Y.2d at 672, since it avoids any need for the State to scrutinize a religious organization's tenets each time an employee performing religious duties is discharged for reasons related to an employer's religious mission. 78 N.Y.2d at 669.

The Court further held that the classification in N.Y. Labor Law §563(2)(c) does not violate equal protection because it is rationally related to the broader legislative purpose of extending unemployment insurance coverage to most employees of nonprofit organizations while maintaining "time-honored" exemptions, as well as the purpose of promoting the efficient administration of the unemployment insurance program. 78 N.Y.2d at 672.

REASONS FOR DENYING THE WRIT

POINT I

THE EXCLUSION FROM COVERAGE OF PERSONS EMPLOYED AT A PLACE OF RELIGIOUS WORSHIP FOR THE PERFORMANCE OF DUTIES OF A RELIGIOUS NATURE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The New York Court of Appeals correctly held that the unemployment insurance coverage exclusion for persons employed at a place of religious worship for the performance of duties of a religious nature, N.Y. Labor Law §563(2)(c), does not violate the Establishment Clause. The exclusion satisfies the test established by this Court for laws challenged under the Establishment Clause because it has a secular legislative purpose, does not have the primary effect of advancing religion over non-religion, and does not foster an excessive entanglement with religion.[3] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

N.Y. Labor Law §563(2)(c) has a secular legislative purpose, as part of a larger act to extend compulsory unemployment insurance coverage to most employees of nonprofit organizations, while retaining exemptions for certain types of organizations having stable employment or providing work for certain persons not in the competitive labor market. These goals are unrelated to religion. That the statute incidentally

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[3] The possible alternative Establishment Clause tests which this Court reportedly recently considered upon oral argument in *Lee v. Weisman, No. 90-1014, 60 USLW 3351* (argued November 6, 1991), governmental endorsement of religion or coercion of religious belief, do not appear to be applicable to this case. Petitioner's Establishment Clause argument does not concern a coercion, but a limited exemption of nonprofit religious organizations, as employers, from unemployment insurance contributions.

benefits religion does not invalidate it. In *Walz v. Tax Commn. of the City of New York*, 397 U.S. 664 (1970), for example, the property tax exemption at issue also benefitted religious organizations by freeing them from property tax obligations, but the legislative purpose passed constitutional muster because the exemption was not "aimed at establishing, sponsoring, or supporting religion." 397 U.S. at 674. As explained in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989):

> [T]his Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.

489 U.S. at 10 (citation omitted).[4]

Moreover, as this Court stated in *Corporation of Presiding Bishop*, 483 U.S. at 335, *Lemon's* purpose requirement "does not mean that the law's purpose must be unrelated to religion"; rather, the aim of *Lemon* is to prevent the government "from abandoning neutrality and acting with the intent of promoting a particular point in religious matters." *Id.* As in *Corporation of Presiding Bishop*, "it is a permissible legislative purpose to alleviate governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Were the coverage exclusion of §563(2)(c) struck down, each time an employee performing religious duties is discharged for reasons related to the group's religious mission, the religious organization would face scrutiny of its

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[4] This case is distinguishable from *Texas Monthly, Inc. v. Bullock*, *supra*, where the Texas sales tax exemption was directed solely at religious publications. Because of that, the Court held that Texas had provided unjustifiable assistance to religious organizations.

religious tenets. The prospect of such scrutiny could well affect the ability of the group to carry out its mission.

The New York Court of Appeals also properly held that *Lemon's* second requirement was met, since "the statute's primary effect is the efficient administration of the Labor Law, attained in part by maintaining a 'benevolent neutrality' toward all religion; in other words, the statute minimizes the involvement of government with the free exercise of religion." *Matter of Klein v. Hartnett*, 78 N.Y.2d at 671. The economic benefit of an exemption from unemployment insurance contributions is incidental to that primary effect. This case, therefore, falls squarely under the *Walz* and *Corporation of Presiding Bishop* cases, holding that similar exemptions did not have the primary effect of advancing religion.

By contrast, in *Texas Monthly v. Bullock*, upon which petitioner relies, the primary effect of the Texas sales tax exemption for religious periodicals was to provide an economic benefit to religion. It was not claimed to promote the efficient administration of the Texas sales tax, since application of a sales tax to individual sales does not require a case-by-case analysis, as application of the N.Y. Labor Law to individual unemployment insurance claims does. Moreover, this Court has found "ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 338. Since the law has a proper purpose, there is "no reason to require that the exemption come packaged with benefits to secular entities." *Id.*

Finally, as the New York Court of Appeals found, "rather than fostering excessive government entanglement with religion, the exemption under examination here necessarily gives rise to a lesser degree of intrusion than would be required were the exemption not granted." *Matter of Klein v. Hartnett*, 78 N.Y.2d at 671-672. Petitioner claims, without explanation, that

the exclusion from unemployment insurance coverage of persons performing duties of a religious nature for a religious organization fosters a greater degree of entanglement between government and religion than extending coverage to them would involve. To the contrary, the statutory exclusion enables New York to avoid intrusive inquiries into the religious activities of religious organizations. If the statutory exclusion were invalidated, respondent Commissioner would be required to inquire into how each such claimant's employment ended (N.Y. Labor Law §593), which in this context might well involve disputes concerning religious doctrine or practice arising from work related conduct such as discussing the theory of evolution, in violation of the employer's rules, or violations of other religious prohibitions. Resolution of such disputes would result in the Commissioner's undue entanglement with religion and possible interference with the free exercise of religion, whether he grants or denies benefits. See Note, *Redemption through Exemption: Unemployment Insurance and Sectarian Schools*, 55 N.Y.U.L. Rev. 242, 257-262 (1980).

Therefore, petitioner has not demonstrated that the Court of Appeals' decision conflicts with the decisions of this Court, or that there is any other important reason for this Court to grant the petition.

POINT II

THE COVERAGE EXCLUSION AT ISSUE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner claims that N.Y. Labor Law §563(2)(c), by excluding her work for a religious school from unemployment insurance coverage while covering teachers in other non-profit schools, is a violation of her right to equal protection. This

argument fails because the statutory classification at issue is reasonably related to legitimate state interests and, thus, comports with equal protection guarantees.

Petitioner concedes that there is no fundamental right to unemployment insurance (Petition p. 17), and the classification at issue does not affect any protected class. The statutory classification involved here is based not upon petitioner's religion, or her sex, as the petition (at p. 17) implies, but upon the religious nature of her employment, excluding from mandatory coverage persons "employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature..." Labor Law §563(2)(c).

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court rejected the argument that laws drawing distinctions on religious grounds should be strictly scrutinized: "[L]aws affording a uniform benefit to *all* religions" should be analyzed under *Lemon v. Kurtzman*. 483 U.S. at 339. As the Court stated:

> In cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. 483 U.S. at 339.

Under *Lemon*, the proper inquiry is whether the government "has chosen a rational classification to further a legitimate end." *Id.*

The purpose of the coverage exclusion in N.Y. Labor Law §563(2)(c) was to provide certain non-profit organizations which have stable employment or workers who are not truly in the labor market with an exemption from unemployment insurance contributions and, in addition, to avoid interference with the

free exercise of religion and promote efficient administration of the unemployment insurance program by avoiding involvement in problems peculiar to religious employment. Section 563(2)(c) is rationally related to these legitimate purposes and, therefore, does not offend the equal protection clause.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the Court deny the petition for a writ of certiorari.

Dated: Albany, New York
April 21, 1992

Respectfully submitted

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